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No. 877

In the

Supreme Court of the United States

October Term, 1962

EDGAR I. SHOTT, JR.,
Appellant,

vs.

STATE OF OHIO,
Appellee

On Appeal from the Supreme Court of the State of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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Now comes the State of Ohio, Appellee, by Raymond E. Shannon, Prosecuting Attorney of Hamilton County, Ohio, Harry C. Schoettmer and Calvin W. Prem, Assistant Prosecuting Attorneys, of Hamilton County, Ohio, and respectfully move this Court for an Order dismissing the Appeal for the reason that there have been no denials of Appellant's federal Constitutional rights in the proceedings below.

JURISDICTIONAL STATEMENT

The appeal of Appellant, Edgar I. Shott, Jr., from the judgment of the Supreme Court of the State of Ohio

presents the question whether the Appellant's conviction for violating the Ohio Securities Act, Sections 1707.44 paragraph (A) and 1707.44 paragraph (C), Revised Code of Ohio, was consistent with the principles of due process as is guaranteed in the Fourteenth Amendment to the Constitution.

OPINIONS BELOW

The brief of the Appellant correctly cites the opinions and judgments below.

THE STATUTE INVOLVED

The statute involved is the Ohio Securities Act, Section 1707.01 through 1707.45, Revised Code of Ohio, and particularly Sections 1707.01 (B), (C-1), (C-2), (E-1) and (E-2); 1707.02 and 1707.03; 1707.14 (A) and (B-2); 1707.29 and 1707.30; 1707.44 (A) and (C-1); and 1707.45.

QUESTIONS PRESENTED

The questions presented by Appellant, on this appeal are:

I. Whether the application of the Ohio Securities Act to the Appellant, in his indictment, trial and conviction, violated the Due Process clause of the Fourteenth Amendment to the Constitution because:

(a) the statute is so vague and indefinite that it failed to provide notice to Appellant that his acts were unlawful, and

(b) the statute improperly and unconstitutionally placed the burden of proof upon the Appellant to overcome a statutory presumption.

STATEMENT OF THE CASE

1. INTRODUCTION

Appellant was tried and convicted by a jury in the Common Pleas Court, Hamilton County, Ohio, of violating Sections 1707.44 paragraph (A), and 1707.44 paragraph (C), Revised Code of Ohio, which sections are a part of the Ohio Securities Act. In essence, the charges were that Appellant (1) sold a security without being licensed, and (2) knowingly sold a security which was not registered, both as required by law.

Although the trial extended over a period of three days, the actual activity in the court room was limited. On the first day, the jury was impaneled and sworn, opening statements were made and the State (Appellee) presented its case. The Court adjourned until the following morning. On that date the Defense (Appellant) advised the Court that it also rested with no presentation of testimony. Court was, thereupon, adjourned until the third morning, at which time arguments were made by counsel and the jury was charged by the Court. In less than one hour of deliberation, the jury returned its guilty verdicts.

2. THE FACTS

On the first day of the trial, after the jury was impaneled and sworn, counsel for Appellant, in his opening statement, made certain admissions and stipulations on behalf of Appellant. Counsel stipulated that Appellant did not have a license to sell securities and that Appellant had never registered a security with the Division of Securities of the State of Ohio (T-7); that the paper writing, constituted a promissory note (T-8); that Sestito handed the sum of two thousand ($2000.00) Dollars to Appellant, and

Appellant gave the note to Sestito; that the note was signed "Shott Investment Company by Edgar I. Shott, Jr." (T-9); that the Shott Investment Company was a partnership comprised of Appellant and members of his family (T-9); that the Shott Investment Company was formed by the Appellant to reduce his income tax payments (T-9); and counsel further stipulated that the Appellant was lending the money to one, Leslie D. Stickler, who was borrowing it regularly from him for the purpose of enabling Stickler to make short term, high interest loans to contractors (T-9).

In view of the statements and stipulations made by Appellant's counsel, Appellee called two witnesses to testify, (1) an Attorney Examiner for the Ohio Division of Securities, and (2) Patrick Sestito, the recipient of the promissory note.

The Attorney Examiner, although it was already stated and stipulated by Appellant's counsel, testified that Appellant was not licensed as a dealer in securities, and that the promissory note was not registered with the Ohio Division of Securities. It is interesting to note that Appellant (Brief, page 5) suggests that this witness "testified to the conceded facts."

Patrick Sestito, a resident of Cincinnati, Ohio, testified that he, in the latter part of the summer of 1960, heard about investment opportunities with the Appellant from certain car dealers on Reading Road (T-27). On September 28, 1960, Sestito had two thousand ($2000.00) dollars in his pocket and went to Appellant's law office. He had not been in previous contact with Appellant, nor had he been contacted by Appellant in any manner. Sestito and Appellant had a discussion about the investing of Sestito's money in buildings and financing (T-18, 19). At that time Appellant explained the workings of the Shott Investment Company and showed Sestito a draft of the progress and

development of the Shott Investment Company. Although intending only to invest one thousand ($1000.00) dollars, Sestito delivered over two thousand ($2000.00) dollars to Appellant because "it sounded so good." (T-20) Sestito was satisfied with the 12½ per cent profit for 60 days, which Appellant offered him. Upon payment to him of the money, Appellant presented Sestito with a promissory note (T-21). The note stated that Appellant would pay Patrick Sestito the sum of two thousand two hundred and fifty ($2250.00) dollars on November 29, 1960. The two hundred and fifty ($250.00) dollars, above the amount actually invested by Sestito represented 12½ per cent profit (T-22). On the due date, Appellant's secretary telephoned Sestito and asked him if he wanted "to parlay it . . . let the note ride" or, in other words, to reinvest it. (T-24) Sestito decided against reinvestment with the Shott Investment Company, went to Appellant's office and received a check of Appellant in full payment of the amount of the promissory note. (T-25).

ARGUMENT

Appellant contends that the record demonstrates a denial to him of the constitutional guarantees of due process because (1) the statute involved is vague and indefinite, (2) the statute created an unlawful substantive presumption, and (3) the prosecutor's closing argument was unlawful and unfair. These same three contentions have been raised by Appellant in each of the reviews he has taken through the Ohio courts, and similar supporting arguments were submitted.

1. THE STATUTE IS NEITHER VAGUE NOR INDEFINITE AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant contends that the statute failed to provide him with notice of the illegality of his acts.

A. History of the Act

The Securities Law of Ohio, which is popularly known as the "Blue Sky Law," has been in existence for more than forty (40) years. Similar statutes, in sister states, have paralleled the life of the Ohio law. Many charges have been brought in the several states, and the Courts have been repeatedly called upon to examine and construe the meaning and affect of the Securities Law. The Ohio law, in particular, was held valid by the Supreme Court of the United States in the case of *Hall* v. *Geiger-Jones Company*, 242 U.S. 539, 61 L. ed. 480. At this late date, Appellant is hard put to say that the Ohio Securities Law is vague, ambiguous and indefinite.

B. Purpose of the Act.

From an intelligent reading of the Ohio Securities Act, its purpose is quite apparent. It is designed and intended (1) to regulate the sale of securities, and (2) to prevent and guard against fraudulent schemes calculated to entrap the ignorant, gullible and unwary.

The preventive part of the law must, of necessity, fit hand-in-glove with the regulative part. In the case of *Hall* v. *Geiger-Jones Company*, at page 550, the United States Supreme Court held that the purpose of the act is:

> "... to protect the public against the imposition of unsubstantial schemes and the securities based upon

them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties, or other repressive measures."

and again at page 551, the Supreme Court said:

"Its purpose is, as we have seen, to give a basis for judgment of securities offered the purchasing public; a sure credit where it is deserved and confidence to investment and trading; prevent deception and save credulity and ignorance from imposition."

The Supreme Court, in the case of *Hall* v. *Geiger-Jones Company*, at page 554, in reply to the argument that all people should be free to act foolishly if they wish, said:

"We are not disposed to give serious attention to the contention that while the statute in form prohibits sales it at the same time necessarily prohibits purchases, and thereby shields the contemplated purchasers from the loss of property by their own defective judgment, and puts them as well as the sellers under guardianship. If we may suppose that such purchasers would assert a liberty to form defective judgments and resent means of information as a limitation to their freedom, we must wait until they themselves appear to do so. Besides, there are examples in legislation of unsolicited protection, and there is much in the business we are considering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business, and that it tempts to and facilitates speculative judgments, if the purpose be trading; improvident judgments if the purpose be investment. . . . it must be judged upon that consideration, not upon the assertion of an absolute liberty which does not exist."

The Securities Law in Ohio literally blankets all of the transactions that are concerned with the exchange of securities created in the economic business within the state.

In the passage of these statutes, it is apparent that the State of Ohio has developed a paternalistic attitude toward the citizens who participate in investments in the state.

C. The Statutes.

Section 1707.01, Revised Code of Ohio, defines the various words and terms used in the Act. This section is clear, concise and conclusive. Without a tortured construction of the words, it spells out the full meaning and impact of the Securities law.

Sections 1707.02 and 1707.03, Revised Code of Ohio. After having examined the economic business of the state, and in order to allow an orderly flow of the sale of securities, the Legislature of Ohio, in this (1707.02) statute, designated certain securities as exempt from the requirement of registration. And in Section 1707.03, the Legislature exempted certain transactions from the requirement of registration. In each exemption set forth, the Legislature has carefully selected those instances where it appears that the citizens of the state do not need the protection of the law. The person who deals in securities, and who desires to comply with the law, can, without difficulty, ascertain that he, and all securities are subject to the registration requirements of the law unless one of the exemptions set forth applies to his particular position. We submit that this simple operation can not, by any twist of the words, be deemed vague, ambiguous or indefinite.

In the implementation of its exclusive control over transactions in securities, the Legislature has placed certain duties upon the Division of Securities. This agency has

filled the paternal roll of protector of the citizens of Ohio and examiner of specific securities, transactions, salesmen and dealers. Into its hands the Legislature has placed the responsibility to determine the safeguards necessary to maintain the proper economic standards of securities issued and sold within the State.

Every citizen engaging in securities and securities transactions is charged with the responsibility of knowing the position of the Division of Securities in relation to a security. To further emphasize the responsibility of each citizen, the Legislature created and enacted Sections 1707.29 and 1707.30, Revised Code of Ohio.

Section 1707.29, Revised Code of Ohio is as follows:

> "In any prosecution brought under sections 1707.01 to 1707.45, inclusive, of the Revised Code, the accused shall be deemed to have had knowledge of any matter of fact, wherein the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge."

Section 1707.30, Revised Code of Ohio is as follows:

> "In any prosecution action or proceeding based upon sections 1707.01 to 1707.45, inclusive, of the Revised Code, a certificate signed by the division of securities, showing the filing of or the failure to file any statement, description or application required by such sections, shall constitute prima facie evidence of such filing or of such failure to file, and shall be admissible in evidence in any action at law or in equity to enforce sections 1707.01 to 1707.45, inclusive, of the Revised Code, or to prosecute violations of such section."

The Appellee has no quarrel with many of the cases cited by the Appellant pertaining to due process of law.

vagueness of statutory language, and so forth. It is submitted that, in and of themselves, these cases reflect the law on the particular issues of fact involved therein, but, it is maintained, that none of them are applicable to the facts of the instant case.

We have found it necessary to approach the securities law from a fundamental concept because of the Appellant's claim that the statute is void and unconstitutional by reason of being vague, ambiguous and indefinite. The devious twistings and turnings of the Appellant, in his actions and words, in an apparent attempt to complicate a simple operation, indicate his intention to evade the law, the Division of Securities and the judgment rendered.

The definitions set forth in *Section 1707.01* are inclusive of all transactions in securities in keeping with the paternal concept of the State. The Appellant seeks a loophole to escape judgment by attempting to create an illusion of confusion. He has taken words out of context and has applied tortured definitions and unreasonable inferences in order to give color to his creation.

"Knowingly and intentionally," as used in Section 1707.44 (C), can only mean that the Appellant, at the time that the transaction was made, was aware of the act he was performing, and that he did the act voluntarily. Any other interpretation must necessarily be strained.

It is argued, by the Appellant, that the facts involved in the instant case, as established at the trial, disclosed "only one transaction"; and that he, therefore, was not "alerted" to the consequences of his single deed; and that the Appellant could not be a "dealer" by reason of this one sale.

Section 1707.01 (B) (C-1) (C-2) defines "security," "sale" and "sell." A promissory note is a security. The indictment, setting forth the charges against the Appellant, accuses him of having unlawfully sold, caused to be sold,

offered for sale, or cause to be offered for sale, a security, to-wit, a written instrument evidencing a promise to pay money, while Appellant was not licensed to sell securities and, likewise, with selling an unregistered security.

A simple statement of the law, as can be determined from an intelligent reading reading of the statutes involved, is that dealers or sellers of securities must first be licensed, and the securities sold must be registered unless the security and/or sale qualifies under the exemptions enumerated in *Sections 1707.02 and 1707.03*.

Section 1707.45, Revised Code of Ohio, provides as follows:

> "In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary to negative the existence of facts which would bring a security within section 1707.02 or 1707.05 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04 or 1707.06 of the Revised Code or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. The burden of proof shall be upon the party claiming the benefits of any such sections."

It is claimed by the Appellant that the language of these statutes is so vague, ambiguous and indefinite that he was unable to determine which acts and conduct were prohibited; what was required of him by the law. It is respectfully submitted that there is absolutely no basis for such claim; that the language used in those statutes is such that men of common intelligence can, without difficulty or conjecture, know and understand the meaning. And, as the Appellant has pointed out in his brief, he is not only a man of common intelligence, but he is an attorney.

There has been no abstract evaluation, no strained reasoning, involved here.

It is submitted that a man of common intelligence, who had bothered to read the statutes before engaging in the "Shott Investment Company" business, as described in the record of this case, would have immediately discovered that promissory notes are securities; that securities require registration, unless exempted; that dealers or sellers must be licensed, unless the transaction is exempted. He would have further discovered that the burden of qualifying under the exceptions becomes his obligation. This he would have discovered from the ordinary, clear and concise language used, and without speculation or conjecture. There being no vague, ambiguous or indefinite language, Appellant's contention that his fundamental right of due process was violated, fails. The Appellant's contention that the Ohio Securities Act falls below the due process benchmark of certainty is unsupported.

2. THE STATUTE DOES NOT CREATE AN UNLAWFUL SUBSTANTIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Appellant further claims that the burden of proving the inapplication of the registration and licensing requirements, having been placed upon him, violated the Due Process Clause. In this connection, the Appellant has purposefully chosen to ignore the clear and concise words of *Section 1707.45*. In effect, this statute has placed the burden upon the Appellant, who claims the benefits of any exemption set forth by the legislature, to proceed and go forward with the evidence to show that the securities law does not apply to the transaction in which he has

indulged. This is a form of affirmative defense and it was, by the same Securities Act, available to him in the event that he decided to avail himself of it. For some reason known only to Appellant and his counsel, the choice was to not take advantage of it.

It is submitted that the theory of the Securities law is that the sale of securities, without a license, and the sale of unregistered securities, is unlawful. Proof of such sale raises a presumption of guilt. That presumption can be overcome by establishing, by only a preponderance of the evidence, that Appellant came within an exemption provided in the statute. Such defense, made available to one accused and found, by a presumption raised from evidence introduced, to be guilty, does not violate Appellant's constitutional rights. Such defense is analogous to the defense of insanity where, likewise, the defendant has the burden of proof.

The Appellant claims that there is no rational connection in the record between the proof and the presumption; and that, therefore, use of the statutory presumption was a violation of due process of law. Appellee submits that such claim is without merit. The record discloses a clear and rational connection between the facts proved and the ultimate fact presumed. The suggestion to this court that the presumption of guilt established in this case was derived solely from the evidence of the Sestito note-transaction, demonstrates the devious twistings and turnings of the Appellant in his effort to evade the law. The record clearly discloses how, when, where and why the Sestito note-transaction took place. The indictment, upon which the Appellant was tried, sets forth and describes only the Sestito note-transaction. Appellant has, in his brief, overlooked the testimony describing how Sestito heard about the investment opportunities in the Shott

Investment Company from automobile dealers on Reading Road; and has, for that matter, overlooked the testimony about the Shott Investment Company itself; and about the prospectus Appellant displayed to Sestito to induce and encourage him to "invest" his money. There is testimony concerning a "profit" of 12½% for an investment of 60 days duration; and testimony about being solicited to "let it ride" or "parlay it". All of such testimony was made available to the jury along with the note itself which bore the maker's name of "Shott Investment Company" by Appellant's name.

The charge of the Court consisted of the reading of the various sections of the Securities Law coupled with instructions concerning the testimony and evidence presented. It is fundamental that the function of the jury is to determine the facts and to reach a decision based upon the law. The jury, in this case, had the benefit of all of the evidence and testimony, and the law.

The situation here is not one where Appellant's liberty has been lost without having had his guilt established, and the convincing of the fact finders of such guilt.

Appellant has cited the cases of *Morrison* v. *California*, 291 U.S. 82, and *Coffin* v. *United States*, 156 U.S. 432, and hints that there are instances where the burden of going forward may be lifted by statute from the state in a criminal prosecution and cast upon the defendant. It is required that the state shall have proved enough to make it just for the defendant to be called upon to repel what has been proved with excuse or explanation. That is substantially what is involved here. The theory of the Securities Law is that any sale of unregistered securities and/or any sale of securities without a license, is unlawful. The Appellee established, and the Appellant stipulated and conceded, that the Appellant was not licensed: that the note was a

promissory note, and that the promissory note was not registered. The Appellee further established the dealing in that note between the Appellant and Sestito together with all of the other supporting evidence and testimony disclosing a sale. As such, and in accordance with the provisions of the law, Appellee established and proved enough to show the jury that the Appellant, in fact, sold an unregistered security to Sestito; and that the Appellant was not licensed. It is respectfully submitted that such proof was more than enough to make it just for the Appellant to step forward and repel what was proved with an excuse or explanation. All that was required of him was to show that one of the exceptions or exemptions was applicable. Such shifting of the burden in no way subjected the Appellant to hardship or oppression, and did not violate his constitutional rights. The claim that *Section 1707.45* violates the due process clause fails.

3. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER AND FAIR.

Lastly, the Appellant contends that he was deprived due process of law because the prosecutor, in his closing argument, was unfair; that the prosecutor was guilty of gross misconduct and stepped beyond the basic standards of fair procedure. The Appellant contends that the prosecutor "repeatedly attempted" to introduce evidence of an extended series of similar loan transactions; and the prosecutor's comments upon the failure of the Appellant to take the stand and to testify.

A reading, from the record, of the argument made by the prosecutor in this case will disclose clearly that, although he displayed earnestness and vigor, and although the blows struck by him were hard, he at no time, and in

no way, abused his position or struck blows which were foul, as the Appellant now complains.

By this attack upon the propriety of the prosecutor's argument to the jury, the Appellant infers that the integrity of the prosecutor is baseless and that his professional ethics are corrupt. A reading of the record belies this condemnation. It points up, once more, the subterfuge in which the Appellant has indulged. The transcription of the prosecutor's argument to the jury shows clearly that the prosecutor summed up the evidence presented during the trial, all of it; that he made reasonable and logical inferences from the facts proved; and that he commented to the jury on the failure of the Appellant to take the stand and testify in his own behalf. In this latter aspect, and in the light of the burden thrust upon the Appellant to carry the proof forward, it was even more incumbent upon the prosecutor to comment on the Appellant's failure to testify in his own behalf than in the usual case in which a defendant is charged with a crime. From the record, the Appellant cannot show that the prosecutor made any deliberate misstatement of facts.

CONCLUSION

This simple trial consisted of a minimum of testimony, a minimum of exhibits, a minimum of rulings by the Court and a minimum of time by the jury to decide the issues presented. The conduct of the trial was straight forward and unhurried, and the Appellant was accorded ample time and opportunity to present the jury with his approach to the issues at hand. There can be no question that the conduct of the trial, in all respects, was fair, reasonable and proper.

The ultimate question to be decided was whether or not the Appellant violated the Securities Law of Ohio by

dealing in securities without having been licensed, and/or selling a security which had not been registered. By its verdict, the jury found that the Appellant had, in fact, done both.

It is respectfully submitted that the Ohio Securities Act, challenged by the Appellant on this appeal, is not vague, ambiguous or indefinite; that it is clearly and concisely written in language that men of common intelligence can understand; that no unjust, unfair or improper presumption was created by the statutes which include a proviso for exempting entirely certain acts and/or transactions, the burden of proof of which is placed upon the party claiming the benefits; that the prosecutor's closing argument was not improper or unfair; and that the indictment, trial and conviction of the Appellant was entirely consistent with the due process clause of the Fourteenth Amendment.

For these reasons, Appellee respectfully submits that the Motion to Dismiss this appeal should be allowed and the appeal dismissed.

Respectfully submitted,

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